

August 26, 2008

Re: Ethics and Elections Commission Case No. 08-1-0415-1

Dear ****:

The Commission staff has investigated your complaint regarding the Director of the Customer Service Bureau (CSB), Ms. Darby DuComb, specifically her January 17, 2008, e-mails to Seattle Department of Transportation (SDOT) employees regarding work that you had undertaken in your planting strip (the "Project"). You have alleged that her actions were a violation of the City's Ethics Code as she is a personal friend of one of your neighbors who had lodged a complaint with the City regarding the Project.

After reviewing the investigation conducted by the Commission staff, I have concluded that there is reasonable cause to believe that Ms. DuComb did violate the City's Ethics Code, but find this violation to have been minor, as well as promptly and appropriately addressed by Ms. DuComb's manager. Accordingly, I will be requesting the Commission to administratively dismiss the complaint at the next regularly scheduled meeting on September 3, 2008.

Facts

In August 2007, your neighbor registered the following complaint about the Project using an electronic form available on the CSB web site:

SDOT – Large hole dug in planting strip

My neighbor dug up a 12 foot by 35 foot area in the planting strip that is now 8 inches deep, It has been this way since May and the neighbor is not doing anything to complete the project. SDOT needs to complete the project and bill her back for it. I read in the code that they can do this.

The complaint was assigned to Ms. Cynthia Phillips, a CSB Complaint Resolution Coordinator.

Ms. Phillips contacted Mr. David Simpson of the Seattle Department of Transportation (SDOT) to inquire about the status of the Project. Mr. Simpson informed CSB that he had contacted you, and you had informed him that you “had a permit and will be installing pavers in the planting strip.” He indicated that your contractor was expected to begin the job in October. Mr. Simpson told Ms Phillips that he “had given [you] until then to get the work done.” Ms. Phillips provided this information to your neighbor.

There was no further contact between CSB and either SDOT or your neighbor between September 2007 and January 2008.

On January 17th, your neighbor called Ms. DuComb. He reported his frustration that there had been no progress on the Project. After receiving the call, Ms. DuComb sent an email at 1:45 p.m. to Ms. Phillips, Mr. Simpson and SDOT Permit Specialist Jenifer Shahan. She wrote: “Peter called again today complaining about the lack of action at this site. It’s a big muddy pit, people cannot exit their vehicles, ….” She cut and pasted your neighbor’s original complaint into the e-mail.

Mr. Simpson contacted you that same day, and at 3:43 in the afternoon he forwarded to you the e-mail he’d received from Ms. DuComb. That same afternoon, Ms. DuComb took three calls about this matter, one of them from you. You told us that in the conversation, Ms. DuComb told you that she was a personal friend of your neighbor, a fact that Ms. DuComb confirmed for us as well. You asked Ms. DuComb for the name of her supervisor, and she told you that she reported to Ken Nakatsu, Chief of Departmental Operations in Mayor Nickels’s office.

At 3:46 p.m. you placed a call to Mr. Ken Nakatsu. When Mr. Nakatsu returned the call, you shared with him your concerns about Ms. DuComb’s involvement in this matter.

At 5:12 p.m., Ms. DuComb sent a second email to Mr. Simpson and Rex Allen both of SDOT. The e-mail reads:

Hi David and Rex,
I am getting calls from the neighbors that Rex is holding up...[the] permit to do the work. Can you all illuminate for me what is going on? If it’s easier to call, please do. Thanks.

Mr. Simpson told us that these e-mails were the extent of his communications with Ms. DuComb. At no point did he ever discuss this matter with her. Rex Allen was never involved in this matter. (Rex *Stratton* is Mr. Simpson’s supervisor, and the “Rex” to whom Ms. DuComb referred in her e-mail.)

The morning of January 18th, your neighbor’s complaint was again assigned to Ms. Phillips. Mr. Nakatsu directed Ms. DuComb to have no further involvement in the matter; Ms. Phillips would report directly to him. On January 23, 2008, Mr. Nakatsu informed you that he was “having Cynthia Phillips in [CSB] handle your complaint and report to me directly if she needs to.”

In an email response to Mr. Nakatsu you wrote that you were “confused as to why you would have someone from [CSB] handle a complaint which involves the Director of [CSB].” Your e-mail closed: “Is there someone else I should contact who will conduct an independent inquiry?” Mr. Nakatsu replied that he had spoken to Ms. DuComb about your concerns and suggested that “[i]f you wish to pursue an independent investigation in to what you believe is unethical conduct, I suggest you contact the City of Seattle’s Ethics and Elections Commission....”

During our investigation, staff spoke with several persons, including Ms. DuComb. During Ms DuComb’s interview, she explained that she and your neighbor have been friends for 15 years. They have dinner together about once every three months and according to Ms. DuComb they “usually go dutch or potluck.” She told us for a period in 2003 she rented two bedrooms and a bathroom in your neighbor’s house from him while her house was being remodeled. She paid \$500 rent per month and shared the house with your neighbor.

Ms. DuComb is the CSB Division Director. The CSB’s purpose is to “assist citizens in accessing City Services.” In addition to providing referrals to City departments and providing information, the CSB staff is to provide a “neutral forum to file a complaint or opinion about a City department,” and “conduct an impartial investigation of a [citizen’s] allegation of unfairness by a City department and ... recommend appropriate action.” CSB also is to “mediate conflicts between an individual and a City department to find a mutual resolution.”

Relevant Law and Administrative Background

The purpose of the Ethics Code is to foster public confidence in the integrity of our City government. Public employees are held to a standard which insures that they are impartial and independent in fulfilling their responsibilities and that governmental decisions are made through proper channels of the governmental structure. To meet this end, the Ethics code is to be “liberally construed in favor of protecting the public’s interest.” *SMC 4.16.020(A) and (B)*.

SMC 4.16.070(1)(a) provides that no current officer or employee shall:

Engage in any transaction or activity, which is, or would to a reasonable person appear to be, in conflict with or incompatible with the proper discharge of official duties, or which impairs, or would to a reasonable person appear to impair, the officer’s or employee’s independence of judgment or action in the performance of official duties and fail to disqualify him or herself from official action in those instances where the conflict occurs.

Discussion

The current complaint raises the issue of whether Ms. DuComb’s long-time friendship with your neighbor, “would to a reasonable person appear to be, in conflict with or incompatible

with the proper discharge of official duties,” or “would to a reasonable person appear to impair, the officer’s or employee’s independence of judgment or action in the performance of official duties,” requiring her to disqualify herself from official duties involving your neighbor.

In the Order issued by the Commission last month regarding Councilmember McIver, the Commission wrote that “[m]ere friendship is not itself a ‘transaction or activity’ within the meaning of SMC 4.16.070(1)(a). However, certain types of transactions or activities between friends could rise to the level of a ‘transaction or activity’ within the meaning of this section.” The Commission held that vacationing together on several occasions was a “transaction or activity” within the meaning of the law.

While it is a closer case in my mind than the case involving Councilmember McIver, I believe that Ms. DuComb’s rental of rooms inside your neighbor’s house five years ago, coupled with their quarterly social activities, are “transactions or activities that would, to a reasonable person, appear to impair her independence of judgment.

Our investigation, however, revealed that Ms. DuComb’s involvement came after a gap of over four months without a recorded update on CSB records by either SDOT or the CSB representative. It is well within CSB’s mission, after the lengthy silence and a protest from the complainant, to initiate communication with SDOT. I also found no evidence that Ms. DuComb attempted to influence SDOT decision making on behalf of her friend, or to otherwise secure preferential treatment for him. It is also noteworthy that when Ms DuComb confirmed the friendship for Mr. Nakatsu, he isolated her from further involvement with the complaint.

Though there is no evidence Ms. DuComb in fact attempted to influence the independence of SDOT decision making on behalf of her friend, this does not resolve the issue. Ms. DuComb should have recused herself from any involvement with your neighbor’s complaint. She did not. Accordingly, there is reasonable cause to believe that Ms. DuComb violated the Ethics Code.

Other Issues

When we interviewed you, you also indicated that you believed Mr. Nakatsu violated the Ethics Code when he assigned your complaint regarding Ms. DuComb to one of Ms. DuComb’s subordinates. Mr. Nakatsu assigned the complaint regarding your parking strip to Ms. Phillips, and suggested you contact this office to register your complaint regarding Ms. DuComb. While I appreciate that Mr. Nakatsu’s January 23rd e-mail, which refers to “your complaint,” may have led you to believe that he was assigning to Ms. Phillips an investigation of Ms. DuComb, I believe that was a misunderstanding that should have been dispelled by his January 24th e-mail referring you to our office for an independent investigation.

You also indicated that you believed that Ms. DuComb had shared with your neighbor details regarding your January 17th conversation with her, in violation of SMC 4.16.070.4. That section, though, bars the disclosure of “privileged or proprietary” information. Your conversation with Ms. DuComb was neither a privileged communication, nor was it proprietary.

(Black's Law Dictionary (6th Ed.) defines "proprietary information" as "[i]n trade secret law, information in which the owner has a protectable interest.") This summer you indicated that Ms. DuComb had provided other information to your neighbor. However, you did not supply us with those documents, and we have been unable to confirm that Ms. DuComb improperly shared information. We sought and received CSB's files this spring, and found no evidence that Ms. DuComb shared privileged or proprietary information with your neighbor.

Conclusion

Seattle Ethics and Elections Commission Administrative Rule 3(G) provides in relevant part as follows:

If the Executive Director has evidence indicating that there are reasonable grounds to believe a violation of SMC 4.16 or SMC 2.04 has occurred, and either (i) the violation was inadvertent or minor, but not both, or (ii) appropriate actions have already been taken to address the allegedly unlawful conduct, the Executive Director may ask the Commission to direct him or her to administratively dismiss the case.

I have determined that there is reasonable cause to believe that Ms. DuComb committed a minor, although not inadvertent, violation of SMC 4.16.070.1.a. (I understand the term "inadvertent" to refer to the conduct, not the violation.) I find it relevant that after you raised your concerns, Mr. Nakatsu removed Ms. DuComb from further dealings with this issue. In light of the minimal involvement of Ms. DuComb in the matter, and in light of her superior's intervention, I do not believe that further proceedings in this matter would serve the public interest.

You are entitled to attend the Commission hearing at which I will ask the Commission to approve this request for an administrative dismissal. If you wish to address the Commission, you may request that the Chair permit you to do so. I plan to make the request on September 3, 2008, during the Commission's regular monthly meeting. This meeting will be held in Room 4080 of the Seattle Municipal Tower, beginning at 4:00 p.m.

Very truly yours,

Wayne Barnett
Executive Director

cc: Seattle Ethics and Elections Commission (*complainant's name and address redacted*)
Darby DuComb, Customer Svc. Bureau Director (*complainant's name and address redacted*)
Ken Nakatsu, Departmental Operations Chief (*complainant's name and address redacted*)